

STATE OF CALIFORNIA

Arnold Schwarzenegger, Governor

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July 12, 2006

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Beyond Shelter Housing Development Corporation
1200 Wilshire Blvd., Suite 600
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Re: Public Works Case No. 2006-005
Central Village Apartments
City of Los Angeles

Dear Ms. Yokada and Ms. Bergman:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the construction of the Central Village Apartments Project ("Project") is not a public work, and is not subject to the prevailing wage requirements of the California Labor Code.¹

Facts

The Project consists of a single, multi-story building containing 46,590 square feet of ground floor retail space ("Retail"), upper floor affordable housing units ("Housing") and an underground garage. Housing is to be developed by Beyond Shelter Housing Development Corporation ("Housing Developer"), which is the Managing General Partner of Central Village Apartments, LP ("Owner"). Other partners include Oppenheim Holdings, LLC ("Oppenheim"), Administrative General Partner, and David Pourbaba, Initial Limited Partner. Housing will consist of 85 one- to three-bedroom apartment units. Pursuant to a Regulatory Agreement with the City of Los Angeles, for a period of 55 years, occupancy of all of these units will be restricted to families earning no more than 60 percent of the Area Median Income ("AMI"), with 47 percent of the units set aside for families at or below 40 percent of AMI. Retail is to be developed by Oppenheim. Oppenheim, the owner of

¹This is so notwithstanding contractual requirements for payment of prevailing wages set forth in certain loan agreements discussed below.

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the land, sold the air rights above Retail to Housing Developer. Oppenheim is to develop Retail with entirely private financing.

The development costs for Housing will be funded by several sources, including a loan by Bank of America from the proceeds of tax exempt bonds issued by the Los Angeles Housing Department ("LAHD") (\$12,829,010); a market rate construction loan by Bank of America (\$2,517,214); loans from the Los Angeles Community Redevelopment Agency ("Agency") (\$2,450,000), the City of Los Angeles ("City") (\$2,762,655) and the Housing Authority of the County of Los Angeles ("HACOLA") (\$820,000); and limited partner equity, for which the limited partner(s) will receive federal Low-Income Housing Tax Credits ("LIHTCs") (\$3,178,874).

The City Loan Agreement provides for a 55-year loan term with a rate of 5 percent simple interest per annum. Funds for this loan are from the Affordable Housing Trust Fund; and the loan is subject to the requirements of Health & Safety Code section 33000 et seq., and specifically section 33334.3.

The Loan Agreement between Owner and Agency provides for a loan term of 55 years, with a rate of 3 percent simple interest per annum. The Agency loan is payable annually from a pro-rata portion (11.55 percent) of residual receipts of Housing, if any. Agency does not anticipate that the residual receipts will be sufficient to significantly reduce the loan balance during the initial 30 years. Funds for this loan came from the Bunker Hill Housing Trust Fund pursuant to a resolution passed by Agency and City Council in conformity with the requirements of Health & Safety Code sections 33334.2, 33334.6 and 33413.

Section 204 of the Agency Loan Agreement sets forth a requirement that state prevailing wages be paid for the construction of Housing,² and provides that this requirement also applies to Retail construction, unless this Department issues a written opinion that prevailing wages are not required for Retail construction.

The HACOLA Loan Agreement provides for a 30-year loan term with a rate of 3 percent simple interest per annum. The source of the funds is housing set-aside funds from the Industry Urban Development Agency pursuant to Health & Safety Code section 33334.2 et seq. and Government Code section 65584.3.

²The City Loan Agreement contains a similar requirement.

Discussion

Labor Code section 1771³ generally requires the payment of prevailing wages to workers employed on public works. Section 1720(a)(1) defines public works to include: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds" This Project clearly will entail construction work done under contract. At issue here is whether the Project is "paid for in whole or in part out of public funds." Section 1720(b) provides in pertinent part:

(b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following:

(1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.

(2) Performance of construction work by the state or political subdivision in execution of the Project.

(3) Transfer by the state or political subdivision of an asset of value for less than fair market price.

(4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.

(5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.

(6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

However, section 1720(c) provides that:

³Subsequent statutory references are to the Labor Code unless otherwise indicated.

(c) Notwithstanding subdivision (b):

...
(4) The construction or rehabilitation of affordable housing units for low-income or moderate-income persons pursuant to paragraph (5) or (7) of subdivision (e) of section 33334.2 of the Health and Safety Code that are paid for solely with moneys from a Low and Moderate Income Housing Fund established pursuant to section 33334.3 of the Health and Safety Code or that are paid for by a combination of private funds and funds available pursuant to section 33334.2 or section 33334.3 of the Health and Safety Code do not constitute a project that is paid for in whole or in part out of public funds.

Health & Safety Code section 33334.2 requires certain tax revenues allocated to a redevelopment agency to be used "for the purposes of increasing, improving, and preserving the community's supply of low-income and moderate-income housing, available at affordable housing cost ...". Subdivision (e) of that section provides in pertinent part:

(e) In carrying out the purposes of this section, the agency may exercise any or all of its powers for the construction, rehabilitation, or preservation of affordable housing for extremely low, very low, low-income and moderate-income persons or families, including the following:

...
(2) Improve real property or building sites with onsite or offsite improvements, but only if both (A) the improvements are part of the new construction or rehabilitation of affordable housing units for low-income or moderate-income persons that are directly benefited by the improvements, and are a reasonable and fundamental component of the housing units, and (B) the Agency requires that the units remain available at affordable housing cost to, and occupied by, persons and families of extremely low, very low, low-income, or moderate-income for the same time period and in the same manner as provided in subdivision (c) and paragraph (2) of subdivision (f) of section 33334.3.

If the newly constructed or rehabilitated housing units are part of a larger project and the agency improves or pays for on-site or off-site improvements pursuant to the authority in this subdivision, the

agency shall pay only a portion of the total cost of the on-site or off-site improvement. The maximum percentage of the total cost of the improvement paid for by the agency shall be determined by dividing the number of housing units that are affordable to low-income or moderate-income persons by the total number of housing units, if the Project is a housing project, or by dividing the cost of the affordable housing units by the total cost of the Project, if the Project is not a housing project.

...
(5) Construct buildings or structures.

...
(7) Rehabilitate buildings or structures.

...

Health & Safety Code section 33334.3 provides in part that:

(a) The funds that are required by section 33334.2 or section 33334.6 to be used for the purposes of increasing and improving the community's supply of low-income and moderate-income housing shall be held in a separate Low and Moderate Income Housing Fund until used.

(b) Any interest earned by the Low and Moderate Income Housing Fund and any repayments or other income to the agency for loans, advances, or grants, of any kind from the Low and Moderate Income Housing Fund, shall accrue to and be deposited in, the fund and may only be used in the manner prescribed for the Low and Moderate Income Housing Fund.

(c) The moneys in the Low and Moderate Income Housing Fund shall be used to increase, improve, and preserve the supply of low-income and moderate-income housing within the territorial jurisdiction of the agency.

...
(f) (1) The requirements of this subdivision apply to all new or substantially rehabilitated housing units developed or otherwise assisted, with moneys from the Low and Moderate Income Housing Fund, pursuant to an agreement approved by an agency on or after January 1, 1988. Except to the extent a longer period of time may be required by other provisions of law, the agency shall require that housing units subject to this

subdivision shall remain available at affordable housing cost to, and occupied by, persons and families of low-income or moderate-income and very low income and extremely low income households for the longest feasible time, but for not less than the following periods of time:

(A) Fifty-five years for rental units. ...

Tax-exempt bond financing such as that funding one of the Bank of America loans is widely used for multi-family housing projects. There are two basic structures for multifamily housing revenue bonds: Publicly-offered and privately-placed.⁴ A private placement, such as the one at issue here, is in substance a real estate loan by the bondholder, here the bank: "The Borrower/Developer essentially borrows money from a bank or other lender, just as it would if no bonds were issued, but the debt takes the form of a bond transaction in which the lender holds the bonds."⁵ The bonds are issued by a governmental issuer (here LAHD), and the proceeds are loaned by bondholder to Borrower/Developer.⁶ Borrower/Developer repays bondholder pursuant to a loan document.

In such a private placement, the issuer never has possession of either the bond proceeds or the loan repayments that are made by the borrower to Bondholder.⁷ This Department has previously determined that money collected for, or in the coffers of, a public entity are "public funds" within the meaning of section 1720. PW 93-054, *Tustin Fire Station* (June 28, 1994). Here, neither the bond revenues nor the loan repayments ever enter the coffers of a public entity, nor are they collected for the public entity. Since none of the money flows into or out of public coffers, the bond financing funding the Bank of America loan is not "the payment of money or the equivalent of money by the state

⁴J. Cooper, *Multifamily Rental Housing: Financing with Tax-Exempt Bonds* (Orrick, Herrington & Sutcliffe LLP, 2003) at 13. Publicly-offered "conduit" bond financing was addressed in PW 2004-016, *Rancho Santa Fe Village Senior Affordable Housing Project* (February 25, 2005).

⁵Cooper, *supra*, at 21.

⁶*Id.* at 22.

⁷*Ibid.* In PW 2004-016, *supra*, the same conclusion was reached with respect to publicly-offered "conduit" bonds. While there are structural differences in the two types of bond issues, they are essentially similar insofar as the public entity has no involvement in the cash flow.

or political subdivision" within the meaning of section 1720(b)(1).

The federal LIHTCs do not entail any action by the state or a political subdivision under section 1720(b)(4). While they may reduce Developer's federal income tax obligations, these are not "obligations that would normally be required in the execution of the contract." The execution of the contract entails expenditures by, not income to, Developer. The tax credits therefore would reduce tax obligations, if any, on income derived from activities other than construction of Housing.⁸

As discussed above, section 1720(b)(1) provides that "payment of money or the equivalent of money by the state or political subdivision" constitutes payment out of public funds. Here the federal tax credits do not entail any payment to Developer by either the state or a political subdivision. Moreover, a tax credit "involves no expenditure of public moneys received or held ... but merely reduces the taxpayer's liability for total tax due." *Center for Public Interest Law v. Fair Political Practices Commission* (1989) 210 Cal.App.3d 1476. Accordingly, the allocation of federal tax credits is not a payment of money or the equivalent of money within the meaning of section 1720(b)(1). As no other provision of section 1720(b) is applicable, the federal tax credits do not constitute payment in whole or in part out of public funds.⁹

Accordingly, the bond proceeds and limited partner equity (for which the federal tax credits are available) are private funds within the meaning of section 1720.

Here the only other funding sources that could be regarded as public are three loans from Low and Moderate Income Housing Funds subject to the provisions of Health & Safety Code sections 33334.2 and/or 33334.3. Under section 1720(c)(4), monies from such funds do not constitute public funds when they are used for the construction or rehabilitation of affordable housing units as authorized by the Health & Safety Code. Here such monies are being used solely for the construction of affordable housing units; construction of Retail is being financed with purely private funds. Thus, the Project entails construction of affordable housing units "paid for by a combination of private funds and funds available pursuant to section 33334.2 or section 33334.3 of the Health & Safety Code," and therefore is subject to the section

⁸PW 2004-016, *supra*.

⁹*Ibid.*

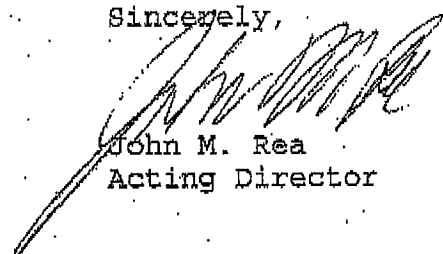
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1720(c)(4) exemption. This is consistent with the precedential determination in PW 2006-002, *Affordable Senior Housing Project, City of Montebello* (March 22, 2006). In short, none of the mechanisms utilized to finance the Project entails a payment out of public funds within the meaning of section 1720.

For the foregoing reasons, the Project is not a public work subject to the prevailing wage requirements of the Labor Code. This does not preclude Agency and/or City from imposing their own prevailing wage requirements and determining the extent to which they apply.

I hope this determination satisfactorily responds to your inquiry.

Sincerely,



John M. Rea
Acting Director